Office-Supreme Court, U.S.
FILED
AUG 23 1965
JOHN F. DAVIS, CLERK

No. ~~946~~ //

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

CHARLES B. MYERS,
611 Field Building
Chicago, Illinois 60603
Attorney for Petitioner

McCORMICK & HENDERSON INC., CHICAGO, ILL.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 346

CANADA PACKERS, LIMITED,

Petitioner,

v.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

The arguments advanced in respondents' brief in opposition to the petition require only limited reply to demonstrate they lack substance and to point up the lower court's error in accepting those arguments as the basis for its decision.

In effect, the respondents are contending that their liability for damages must be gauged by the domestic rates applying from American origins to the border point crossings. This Court rejected a similar argument in

Lewis-Simas-Jones, 283 U.S. 654, 657, 658, 663, holding that the Commission had jurisdiction and the duty to demine the reasonableness of the joint through international rate which was (as here) the rate the shipper was compelled to pay.

Respondents argue, at page 7 of their brief, that petitioner is unable to cite any authority recognizing the Commission's jurisdiction to award reparation on international joint rates without deduction for that portion of the charges attributable to transportation in a foreign country where, as here, the charges allegedly are separable.

The answer to that contention is already in the record in this very case, for the respondents had argued to the Commission that the damages could not be measured in a matter beyond its jurisdiction, and in response thereto the Commission said:

> As has been pointed out, in the *Consolidated Rendering* case reparation was awarded on shipments which had moved, as here, at joint through rates to Canadian destinations. (App. Dfts., p. 20)

The argument that the charges are separable must necessarily rest on a foundation that they are comparable and are derived from rates of the same character and applicability. But the record plainly shows that the rates from Loving and Carlsbad to Detroit and Port Huron are domestic rates and were not applicable to the through international movement from Carlsbad and Loving to the Canadian destinations in question. Petitioner's point can best be illustrated by quoting what this Court said at page 663 of the *Lewis* case:

> The trial court's findings are not sufficient to show that at the time the shipments in question moved defendant maintained a just and reasonable rate *applicable* to the transportation of such shipment over its

lines from the international boundary to destination. The tariff, as described in the findings, does not purport to apply to the American part of such international transportation. A carload shipment "originating" at Nogales or at the point where the line of the foreign carrier and that of the defendant touch the boundary or in defendant's railroad yard adjacent to the boundary clearly must be distinguished from a through carload shipment brought to defendant at the boundary by a foreign carrier. The former covers local transportation only and involves two terminal services, one at Nogales, the point where received from the shipper, and the other at San Francisco, the place where delivered to the consignee. The latter involves the transportation of a through car from the point of connection and only the one terminal service at destination. It is manifest that a tariff limited, as is that described in the findings, to shipments so originating on defendant's line does not *apply* to the American part of the transportation of an international shipment on a through bill of lading. It is to be presumed that if any tariff covering that part of the through service existed, defendant would have produced it; and, in view of the facts shown, the burden was upon the carrier to bring forward evidence that a rate therefor had been established as required by the act. It follows that the lower court erred in distinguishing this case from the *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, 72 L. Ed. 225, 48 S. Ct. 39, *supra*. That case controls this one. [Emphasis added.]

It is evident from the foregoing that the domestic rate is not of the same character as a joint through international rate, did not apply on the through international shipments and obviously cannot be used as a measure of the American portion of the through charges. Further, this Court has indicated that the Commission cannot consider separately only a portion of through international rates. See *Great Northern Ry. Co.* v. *Sullivan*, 294 U.S. 458.

Next, petitioner respectfully directs this Court's attention to the fact that the respondents' brief carefully avoids any discussion or explanation of why that rule of law (invoked in the *Lewis* case) which holds that connecting carriers are jointly and severally liable as joint tort-feasors for any damages caused by their assessment of an excessive joint through rate, is not appropriate in this proceeding. That rule, petitioner submits, is applicable to the instant case and respondents' efforts to distinguish this case from *Lewis* and *News Syndicate Co.* v. *New York C. R. Co.*, 275 U.S. 179, are patently invalid.

The discussion at page 9 of the brief to the effect that the Commission awarded reparation in the *Consolidated Rendering* case in the amount of 62 cents per ton while in the instant case reparation was on the basis of 80 cents or, in some cases, $1.20 per ton (the differences between the lower figure and the two higher figures allegedly representing transportation in Canada) does not sustain respondents' position herein. First, the Commission considered, as it must, the entire international rate, that is, the basic rates plus the interim and permanent increases and not simply differences in the amounts of reparation. Secondly, this Court has held (1) that the division of the joint rate among the participating carriers is no concern of the shipper (*Louisville & N.R. Co.* v. *Sloss-Sheffield Co.*, 269 U.S. 217, 234) and (2) that the railroads are liable for the damage caused to the shipper without regard to the proportion of the charges attributable to the foreign transportation or paid to the foreign carrier. (275 U.S. 187, 188; 283 U.S. 654, 660)

Finally, although repeatedly challenged by petitioner to do so, respondents do not attempt to explain why the Commission in the present proceeding is constrained by Section 1(2) of the Interstate Commerce Act from awarding reparation "beyond its territorial jurisdiction" but was not so limited in the *Lewis* and *News Syndicate* cases. Petitioner submits that the Commission's action herein was within its power and in complete harmony with those two cases. Respondents argument that this case is distinguishable from *Lewis* and *News Syndicate* is without substance.

CONCLUSION

Petitioner respectfully urges, for the foregoing reasons and for the reasons heretofore stated in the petition, that a writ of certiorari should issue as prayed.

Respectfully submitted,

CHARLES B. MYERS
Attorney for Canada Packers, Ltd., Petitioner
611 Field Building
Chicago, Illinois 60603